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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 80

ZENITH RADIO CORPORATION, A CORPORATION,
Petitioner,

vs.

HAZELTINE RESEARCH, INC., A CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR REHEARING OF HAZELTINE RESEARCH, INC.

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PETITION FOR REHEARING OF HAZELTINE RESEARCH, INC.

Petitioner Hazeltine Research, Inc. (HRI) respectfully prays for a rehearing on the following grounds:

I. The Court has created and given retroactive effect to a new, conclusive presumption of fact as to the effect of releases, which will have broad application to releases previously given in antitrust and other litigation, will *foreclose* a determination of actual intent, and will in many cases produce a result directly *contrary* to the actual intent of the parties.

II. If the Court's holding as to the intended scope of the 1957 releases is considered to be an *actual* finding of fact, it is in conflict with established legal principles and contrary to the record.

III. The Court has overlooked the fact that the consideration received by Zenith under the 1957 settlement had a value of $45,000,000 (not $10,000,000) and that a portion of that consideration was necessarily in satisfaction of future damages from pre-release acts, so that Zenith will recover the same damages twice.

IV. The unjustifiable impact upon HRI of the erroneous ruling as to the 1957 releases is emphasized by the record in *Zenith* v. *United States,* a recently decided tax case, in which the facts stated by Zenith witnesses are not consistent with the extensive damages awarded against HRI.

I.

The Court ruled that the question whether a release shall apply to joint tort-feasors in an antitrust case shall be determined according to "the intentions of the parties," and that the prior rule that a release runs to joint tort-feasors unless there is an express reservation of rights in the release, no longer shall apply (Op. 24-25).[1] However, rather than providing for a factual determination of intent in the normal manner, this Court instead then created, and gave retroactive effect to, a *new, conclusive presumption of fact* which not only *forecloses* a determination of actual intent, but which will in many cases give an effect to releases which is the *complete opposite of what the parties intended.*

The Court held "The intention of the parties" not to release joint tort-feasors is "absolutely clear" (Op. 25). It reached this conclusion on the *sole ground* that the settle-

[1] Citations to the Court's opinion are abbreviated "Op. .....". All other citations are abbreviated as set forth at footnote 1, p. 2, of HRI's brief.

ment agreement provided that the releases would run to the benefit of "the parent and subsidiaries" of the party receiving the release (Op. 25-26). The Court reached this conclusion (1) despite the admissions of Zenith to the contrary referred to herein (see p. 7 *infra*), and (2) despite the fact that there had been no hearing or opportunity to adduce evidence on the question. The references to parent and subsidiaries *without* reference to joint tort-feasors was held dispositive, making any hearing as to actual intent superfluous—it was *per se* and necessarily *conclusive.*

If it could be said that the reference to subsidiaries and parent corporations creates only a rebuttable presumption of intent which is not conclusive where it can be shown by other evidence that the parties did intend to release co-conspirators, then a hearing should be granted here so that all relevant evidence can be offered and considered.

Since the Court did not order such a hearing, the net effect of the ruling is that any time a settlement agreement or release specifically includes someone other than the principal released party the lower courts *must* hold that the parties intended not to release unnamed co-conspirators or joint tort-feasors and cannot consider any other evidence, no matter how convincing that other evidence might be of a contrary intent. We respectfully submit that this is an error of law having far-reaching and serious repercussions in the administration of justice not only in antitrust cases but in the construction of releases generally.

Aside from its prejudicial effect upon HRI, this new presumption will produce a result *directly contrary* to the actual intent of the parties in many releases heretofore entered into. It is normal practice in antitrust and other litigation to obtain broad, general releases not limited to the claims in suit, and including the corporate family of the

released parties, *i.e.*, "parents, subsidiaries, affiliates, etc."[2] And in the absence of an express reservation of rights against co-conspirators, the repeated holding of the courts in antitrust cases has been that such a release did release unnamed co-conspirators. See, *e.g.*, *Combined Bronx Amusements, Inc.* v. *Warner Bros. Pictures, Inc.*, 132 F.Supp. 24 (S.D.N.Y. 1955) ("the respective subsidiary, parent and affiliated companies"); *Solar Electric Corp.* v. *General Electric Co.*, 156 F.Supp. 51, 56 (W.D. Pa. 1957) ("all its subsidiary and affiliated companies"); *Dura Electric Lamp Co.* v. *Westinghouse Electric Corp.*, 249 F.2d 5, 7 n.2 (3d Cir. 1957) ("all its subsidiary and successor companies"); *Twentieth Century-Fox Film Corp.* v. *Winchester Drive-In Theatre, Inc.*, 351 F.2d 925, 927 (9th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966) ("parents, subsidiaries and affiliates").

What will happen then to the untold number of releases previously given in which the parties intended that unnamed joint tort-feasors be released and referred to parents and subsidiaries, which reference was not determinative prior to this Court's decision in the instant case? If this presumption is applied retroactively as the Court has done, it will have a far reaching effect in fostering controversy and litigation. For if the presumption is proper, it has equal application in construing releases both in anti-trust litigation and other litigation, and lawyers must so construe it.

We submit that, having rejected the prior generally accepted rule as to the effect of releases on the ground it may not accord with actual intent, it is an *anomoly* to propound and give retroactive effect to a new rule as to presumed

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[2] The obvious purpose of the inclusion of parents, subsidiaries etc., is to give the general release maximum breadth even to claims not in litigation, including claims the releasing party might have against parents and subsidiaries, etc., not based on a claim of co-conspiracy or joint tort.

intent which may not, and in all probability does not, accord with the actual intent of the parties.

II.

If this Court's ruling is considered as a finding of fact, it conflicts both with the record and several recognized legal principles. The first of these principles is that the parties to a transaction are presumed to act in light of the law as it existed at the time[3] and that to construe and know the obligation of a contract we must look to the law in force at its making.[4]

In 1957 the law in antitrust cases was that the release of one alleged co-conspirator, in the absence of an express reservation against others, was a release of all. See, *e.g.*, *Eagle Lion Classics, Inc.* v. *Loew's Inc.*, 121 F.Supp. 128, 129 (S.D.N.Y. 1954), *mod. on other grounds*, 219 F.2d 196 (2d Cir. 1955); *Michael Rose Productions, Inc.* v. *Loew's, Inc.*, 141 F.Supp. 257, 263 (S.D.N.Y. 1956); *Combined Bronx Amusements, Inc.* v. *Warner Bros. Pictures, Inc.*, 132 F.Supp. 921, 922 (S.D.N.Y. 1955); *Solar Electric Corp.* v. *General Electric Co.*, 156 F.Supp. 51, 58 (W.D. Pa. 1957); RESTATEMENT OF TORTS, § 885 at 460-63 (1939); see also *Lysfjord* v. *Flintkote Co.*, 135 F.Supp. 672, 675 (S.D. Cal. 1955), *rev'd on other grounds*, 246 F.2d 368 (9th Cir. 1957);

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[3] *American Security and Trust Co.* v. *Frost*, 117 F.2d 283, 285 (D.C. Cir. 1940), *cert. denied*, 312 U.S. 707 (1941); *Vokal* v. *United States*, 177 F.2d 619, 625 (9th Cir. 1949); *Commissioner of Internal Revenue* v. *Paulson*, 123 F.2d 255, 257 (8th Cir. 1941); *Macias* v. *Commissioner of Internal Revenue*, 255 F.2d 23, 28 (7th Cir. 1958); *In re Shubert's Will*, 10 N.Y. 2d 461, 180 N.E.2d 410, 416 (1962).

[4] *Worthen Co.* v. *Kavanaugh*, 295 U.S. 56, 60 (1935); *United States* v. *Yazell*, 382 U.S. 341, 347-50 (1966); *Farmer's & Merchant's Bank of Monroe* v. *Federal Reserve Bank of Richmond*, 262 U.S. 649, 660 (1923); *American National Bank & Trust Co. of Chicago* v. *General Outdoor Advertising Co.*, 18 Ill. App.2d 602, 153 N.E.2d 110, 113 (1st Dist. 1958).

Rector v. *Warner Bros. Pictures, Inc.*, 102 F.Supp. 263, 264 (S.D. Cal. 1952). Indeed no antitrust case had even suggested any other result.[5]

The lawyers who were involved in the 1957 settlement and releases were not "unwary" attorneys but experienced antitrust lawyers[6] representing sophisticated litigants who would be presumed to have known that under the antitrust law as it then existed, to reserve rights against joint tort-feasors, the settlement had to be framed in terms of a covenant not to sue or a release with an express reservation of rights against unnamed co-conspirators (and indeed it was well-known practice to do so[7]). That they chose not to provide for such a covenant or reservation, shows that they *in fact* intended that the settlement *would* release unnamed co-conspirators.[8] To hold otherwise is to hold

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[5] The district court decision in the *Winchester Drive-In Theatre* case, the only antitrust case cited by the Court's instant opinion as representing a different rule (Op. 23-24), was not decided until 1964 and was promptly overruled by the Court of Appeals on the strength inter alia of this Court's 1964 decision in *Aro*, which the Ninth Circuit read as adopting the rule that the release of one releases all absent an express reservation to the contrary (351 F.2d at 931). In fact, although the instant opinion states that there was no reservation of rights in *Aro* (Op. 24), there was a reservation of rights against contributory infringers (see 377 U.S. at 494, 496).

[6] Mr. Thomas C. McConnell for Zenith; Mr. John T. Cahill of Cahill, Gordon, Reindel & Ohl for RCA; Mr. Whitney North Seymour of Simpson, Thatcher & Bartlett for General Electric; Mr. John T. Wood of Dewey, Ballentine, Bushby, Palmer & Wood for Western Electric (A. 2786).

[7] See, *e.g.*, *Lysfjord* v. *Flintkote Co.*, 135 F.Supp. 672, 675 (S.D. Cal. 1955); *Rector* v. *Warner Bros. Pictures, Inc.*, 102 F.Supp. 263, 265 (S.D. Cal. 1952).

[8] See *United States* v. *Yazell*, 382 U.S. 341, 347-50 (1966); *In re Shubert's Will*, 10 N.Y.2d 461, 180 N.E.2d 410, 416 (1962); *American Security & Trust Co.* v. *Frost*, 117 F.2d 283, 285 (D.C. Cir. 1940), *cert. denied*, 312 U.S. 707 (1941); *American National Bank & Trust Co. of Chicago* v. *General Outdoor Advertising Co.*, 18 Ill. App.2d 602, 153 N.E.2d 110, 113 (1st Dist. 1958).

that parties, while intending a certain result, used language which they knew under the law as it then existed would not produce that result. We respectfully submit that this would be contrary to all logic.

That it *was in fact* the intent of the parties that joint tort-feasors should have the benefit of the release is confirmed by the judicial admission of Zenith through its counsel Mr. T. C. McConnell. In opposing the motion to reopen he admitted upon a question of the District Court that if HRI was a "joint tort-feasor, as we allege they were, they would be released . . ." (AA. 189; A. 3035). Mr. McConnell was the lawyer who negotiated the settlement for Zenith (A. 2783-86). He obviously intended that the releases have the effect of releasing unnamed joint tort-feasors. Otherwise why would he have permitted his client to execute releases which he understood had the legal effect of releasing joint tort-feasors.

Confirming evidence of Zenith's intent is the fact that at no time after the reopening hearing in March 1965, until Zenith's reply brief in this Court, over five years later, did Zenith question that the releases applied to joint tort-feasors.[9]

As to the intent of the parties receiving the releases, almost contemporaneous with their execution General Electric was obtaining summary judgment in an antitrust case

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[9] Zenith's failure to make any such assertion plus Mr. McConnell's statement in the trial court led the government in its amicus brief on the first certiorari in this case to conclude that "Zenith seemed to concede (VII A. 3035) that this particular release extended to liabilities resulting from the pre-1957 acts of all parties to the conspiracy charged in that earlier litigation" (Brief for United States as Amicus Curiae, No. 49, October Term 1968, pp. 42-43).

The only argument Zenith ever made before its reply brief was that releases of future damages from past acts were unenforceable as "against public policy" (A. 3035).

on the basis *inter alia* that a release to Corning Glass Works released General Electric as an alleged co-conspirator. *Solar Electric Corp.* v. *General Electric Co.*, 156 F.Supp. 51, 58 (W.D. Pa. 1957). The same position was taken by Simpson, Thatcher & Bartlett, who represented RCA in the 1957 settlement, in *Eagle Lion Classics* v. *Loew's*, 121 F. Supp. 128, 129 (S.D.N.Y. 1954) and *Michael Rose Productions* v. *Loew's, Inc.*, 141 F.Supp. 257, 263 (S.D.N.Y. 1956).[10] In fact, compare the standard "Julius Blumberg, Inc." printed form involved in the *Michael Rose* case (141 F. Supp. at 259-60) with the release herein (Op. 20 n. 10).

For RCA, General Electric and Western Electric to have accepted a release which did not benefit joint tort-feasors would have been foolhardy, for it could have exposed those companies to a possible claim of contribution among joint tort-feasors, thereby creating the possibility that they might have to contribute to a treble damage recovery by Zenith against another alleged joint tort-feasor.[11]

If the Court cannot accept the established presumption that parties have acted with knowledge of the law, and Zenith's admissions, as dispositive, we submit that the question of intent should be remanded so that there may be a hearing and a *factual* determination of the "intention of

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[10] In both these cases the release was ultimately held to be not dispositive of the case, because of a question as to whether the releases were intended to include antitrust claims. See 143 F.Supp. 606, 607 (S.D. N.Y. 1956) and 219 F.2d 196, 198 (2d Cir. 1955). However, neither of these subsequent rulings in any way disturbed the ruling that absent an express reservation a release given to one joint tort-feasor releases all.

[11] The question of contribution or indemnity among joint tort-feasors was far from settled, particularly in an active-passive situation. See, *e.g.*, "Contribution In Antitrust Actions," 31 Fordham L. Rev. 110 (1962-63); 45 N.Y. U. Law Rev. 263 (1970).

the parties to the 1957 release" (Op. 25). That factual determination should not be limited to a consideration of the settlement agreement (upon which this Court placed sole reliance) but should consider all relevant evidence. It is settled that if parol evidence is to be used to explain a document all such evidence must be considered, *Asheville Mica Co.* v. *Commodity Credit Corp.*, 335 F.2d 768, 771 (2d Cir. 1964), and that appellate courts should not draw factual conclusions by speculation where the data necessary for certainty was not given the trial court. *Riley* v. *Titus*, 190 F.2d 653, 655 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 855 (1951).

III.

The Court pointed out that to the extent the 1957 settlement compensated Zenith for 1959-1963 damages from prerelease conduct of the pool:

> ". . . HRI would have available to it a defense of payment, for it is being ordered by the District Court to make full payment for all the 1959-1963 damages inflicted by all the members of the pool. It is settled that, entirely apart from any release, a plaintiff who has recovered any item of damage from one coconspirator may not again recover the same item from another conspirator; *the law*, that is, *does not permit a plaintiff to recover double payment.*" (Op. 26).[12]

However, the Court indicated that the defense of payment does not apply because the record shows that the $10 million cash payment was for past damages.

The Court's decision is based on the erroneous assumption that the only consideration given Zenith for the 1957 settlement was $10 million (Op. 26), when in fact the value

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[12] Where emphasis appears in quotations in this petition, it has been supplied by us unless otherwise indicated.

of the consideration received by Zenith amounted to $45,000,000.

The agreement for settlement of the Delaware and Chicago actions (Plaintiff's Exhibit No. 48, A. 2783-86) called for the payment of $10 million in cash, but also involved releases of claims for past infringements by Zenith, and continuing royalty-free, world-wide patent licenses. Mr. McConnell, Zenith's counsel who signed the 1957 settlement agreement (A. 2786), in opposing HRI's motion to reopen in this case, stated as to the 1957 settlement:

> "And they paid my client ten million in cash, twenty-two million dollars in forgiven claims for royalties, free licenses all over the world, a *total* result accounting to some *forty-five million dollars* . . ." (AA. 171).

Thus, the consideration to Zenith involved $10,000,000 in cash for past damages for Canada, forgiveness for claims for past infringements valued at $22,000,000, and royalty-free world-wide licenses valued at $13,000,000, totalling $45,000,000.

That a substantial part of the settlement above and beyond $10 million was for future damages is clearly shown by the testimony of Zenith's President Wright on examination by Zenith's counsel. He confirmed that the $10 million in cash was the "simple computation of single damage in Canada during the damage period" in the *RCA* case and that the $10 million figure was the one used to settle the lawsuit "for our loss and damage" (A. 656-57). The remainder could not be for the other countries because Wright testified that "Mr. McConnell and I agreed that we would waive the damages that we had asked for loss of trade in other foreign countries" (A. 652), that Zenith felt it could not prove damages as to England and Australia, and that the parties got to the point in the settlement nego-

tiations where they were talking only about damages in Canada (A. 656-57).[13]

The releases included not only past damages but all claims, causes of action, etc., which Zenith "hereafter can, shall or may have" by reason of acts occurring prior to the releases (A. 3051-52). Since the $10 million cash payment was for past damages as to Canada and no damages were claimed as to other countries, it is unavoidable that a substantial portion of the remaining consideration valued at $35 million was for future damages which Zenith might suffer in Canada as the result of the pre-release conduct of the pool, including damages suffered during the 1959-1963 period. We respectfully submit it was error for this Court to conclude that the defense of payment "is not sustainable on the facts contained in the record" (Op. 26).

The Court also commented on the question of timeliness and failure to "press" the $10 million as payment in this Court (Op. 26). Obviously a payment for pre-release damages would not apply against a claim for future damages. As concerns the additional $35 million consideration, HRI was not apprised that the settlement had this substantial value in excess of the $10 million until the arguments on the motion to reopen (AA. 171). The issue here presented was the correctness of the Court of Appeals' ruling that the release, irrespective of the extent of consideration, constituted an absolute defense to future damages based on pre-release acts.[14] However, in discussing

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[13] In the Delaware case, which involved a declaratory judgment action by Zenith as to patents and a counterclaim of patent infringement, Zenith made similar broad allegations as to conspiracy, etc., as were made in the Chicago litigation, but as a patent misuse and antitrust defense to the enforcement of patents (PX 36, A. 2667-90). See *Zenith Radio Corp.* v. *RCA*, 121 F.Supp. 802 (D. Del. 1954).

[14] We comment briefly as to "timeliness" of the release defense at pp. 16-17, *infra*.

that issue, HRI specifically pointed out to this Court that the total value of the settlement to Zenith was $45 million, and that the $10 million cash payment discharged past damages (HRI Main Br., No. 1117, Oct. Term 1969, pp. 22-23 and n. 14).

In any event, the Court has pointed out that the law does not permit Zenith "to recover double payment" (Op. 26), so that to the extent that the consideration received was compensation for the damages claimed here, it should be deducted from the amount awarded by the trial court, particularly since, as this Court pointed out in its first opinion, Zenith's evidence as to the fact of damage in Canada was "by no means conclusive" (AA. 14; 395 U. S. at 114).

IV.

We call attention to the record in the recently decided case of *Zenith Radio Corporation* v. *United States*, No. 67 C 1675, Northern District of Illinois (see affidavit of Victor P. Kayser, attached hereto), because it offers an insight into the relatively small amount of damage suffered by Zenith in Canada by reason of post-release conduct. It thus emphasizes the grave impact of this Court's failure to give effect to the 1957 releases and from the preclusion of any further hearing on the amount of Zenith's damages.

In *Zenith* v. *U.S.*, which first came to the attention of HRI's counsel after the November 10, 1970 argument in this Court, Zenith sought to obtain capital gains treatment on the $10,000,000 in cash it had received for past damages as to Canada in the *RCA* case, asserting that the payment was for damage to good will and not for lost profits. After extensive discovery the case was submitted to the Court which ruled against Zenith on December 8, 1970.

The lack of major damage to Zenith by reason of the post-release conduct of the pool was disclosed in the testimony

in that case of Mr. Wright, now Chairman of Zenith, and of Mr. Sydney Capell, who was involved in setting up Zenith's Canadian business after the *RCA* case settlement and is currently Vice President and General Manager of Zenith's Canadian radio and television subsidiary.

Mr. Wright's testimony showed that despite the Trade Builder ad in 1958 and the question raised by the pool as to the need of Zenith to have a license, Zenith was able quickly to obtain a distribution organization and build up a substantial market after the 1957 settlement:

"Q. Going back to 1959 when you began to build a marketing organization in Canada, I assume you have probably had a few problems in overcoming or doing an about-face on the previous situation with Canadian Patents Limited. How did you go about convincing distributors that it was now okay to distribute Zenith products?

A. Well, of course, the settlement of that lawsuit got great publicity here in the United States.

Q. Yes.

A. And also in Canada; and the Government lawsuits against Westinghouse and GE—

Q. Yes.

A. (Continued)—drew very critical comments from Canadian sources that the United States was trying to interfere with internal affairs in Canada and I think everyone had been following it and knew all about it *so it was not a question of our having to build a district organization. It was a question of our picking and choosing from the people waiting at the door.*

Q. The appetite was still there.

A. *The appetite was still there and from a very nominal start, it built up into a very substantial business in a very short period of time*" (Wright Dep. pp. 55-56).

As concerns the question whether distributors were frightened off by the continued existence of the Canadian pool or its policies, Mr. Capell testified, in part, in connection with obtaining distributors:

> "Q. Did any of them express any fear of additional lawsuits by CRPL that you can recall?
>
> A. These particular people who had expressed interest in handling the product, any that I recall talking to (and I don't recall it too clearly) weren't apparently concerned with that" (Capell Dep. pp. 57-58).

As to the question of concern by distributors by reason of notices or advertisements by the pool, Mr. Capell testified:

> "Q. How about after you went to work for Zenith and you began contacting Mr. Miguel's list of contacts; did any of these people raise with you discussion of these kinds of notices or advertisements (again referring to defendant's Exhibits A through E for identification)?
>
> A. No. No." (Capell Dep. p. 74).

Although Zenith has contended in this suit that it had so little success in getting distributors that it was "forced to use its Canadian hearing aid distributor as a television distributor" (Zenith Reply Brief, No. 49, Oct. Term, 1968, p. 27), Mr. Capell testified as follows:

> "Q. Did anybody ever look into the possibility of expanding the organization that he [the hearing aid subsidiary] had? For example, did you ever consider that?
>
> A. No, because it was considered that these people were specialists in the hearing-aid field, and we would need people who were experienced in the radio-TV merchandising field. A different kind of dealer outlet

we would be looking for, you see" (Capell Dep. pp. 51-53).

The testimony in *Zenith* v. *U. S.* concerning the success of Zenith's business after the 1957 settlement shows that the impact of the post-release conduct of the pool was substantially less than asserted by Zenith in the instant litigation (A. 456-458, 472-490).[15]

V.

We are fully cognizant that petitions for rehearing are granted most rarely, and that this Court has spoken on those questions of antitrust law which presumably caused it to grant certiorari. We are also aware that this Court has characterized this as "marathon litigation" (Op. 1), and indicated its desire to now bring it to an end (Op. 18-19). However, we suggest that a further hearing should be granted and the decision modified, not only because of the potentially broad and unsettling impact of the new presumption of intent created by the Court as to releases, but also as a matter of basic justice to HRI.

(a) As to the length of the litigation, Zenith did not file its counterclaim until May 22, 1963, some 3½ years after the complaint was filed (November 1959). During the period from January, 1965, when the original trial findings were entered calling for a judgment of almost $49,000,000, until this Court's first opinion on May 19, 1969, over four years later, HRI was engaged in establishing that *about $30,000,000* of the initial Zenith claim was unjustified. If HRI *had been denied* the time and opportunity to prove

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[15] The tax case testimony confirms the statements in Zenith's Annual Reports to its Shareholders (1959: "strong distribution network at both wholesale and retail levels"; 1960: "important gain"; 1961: "enthusiasm of distributors and dealers", "gratifying progress"; HRI Main Br., No. 49, October 1968 term, pp. 113-115).

the embargoes and related matters, *Zenith would have been awarded $30,000,000 to which it had no legal right.* Should Zenith now be awarded $19,000,000 to which, at least in part, it has no legal right?

(b) The Court criticizes HRI's trial counsel for failure to raise the defense of release and limitations after Zenith's pre-trial brief and contentions during trial indicated that Zenith would claim damages based on pre-release and pre-damage period conduct (Op. 5, and n.1). However this criticism overlooks the fact that a purpose of pleadings is to enable the adverse party adequate opportunity to answer and prepare for trial[16] through discovery and that Zenith did not disclose its new position during discovery and instead waited until the eve of trial.

Certainly, when Zenith stated in its motion for leave to file its counterclaim and its sworn affidavit that it was seeking damages only on the basis of acts occurring after the filing of the answer on April 7, 1960 (Op. 5, n. 1), HRI's counsel was *entitled to rely* on those representations in evaluating the counterclaim filed May 22, 1963.[17] Accordingly, although he knew there had been a settlement agreement calling for general releases (PX 48, A. 2783), there would be no reason why he would investigate as to whether the releases subsequently given covered future damages from pre-1957 acts. Indeed, the pleading of the release (and limitations) would have been irrelevant.

The Court states that Zenith gave notice of its new position in its pre-trial brief (Op. 5, n.1; Concurring Op. 2,

[16] 2A Moore, Federal Practice, ¶ 8.13, p. 1695.

[17] There were references to earlier conduct but these were to outline the nature of the alleged conspiracy and form a basis for injunctive relief.

n.1); however that brief was served on Tuesday, February 11, 1964[18] and the trial began Monday, February 17, 1964—just six days later. In light of Zenith's motion and affidavit that its damage claim was based on acts occurring after April 7, 1960, it cannot be said that prior to February 11, 1964, HRI was "unambiguously called upon to submit a formal plea" of release or limitations (Op. 12-13). And if HRI's counsel is to be faulted for failing to conduct a factual investigation, discover the scope of the release, and amend his pleading, all in the few days before trial, does not this transform this litigation into a "game of skill in which one misstep by counsel may be decisive to the outcome"? (Op. 13).

It was not until additional counsel entered the case and had an opportunity to make an investigation in light of the record and the findings, that it was determined that the releases which had been executed did in fact include *future* damages from pre-release acts. We submit that whether or not original counsel might have determined that fact *after* trial is not relevant, because discovery of the scope of the release called for reopening of the proof after the initial trial in any event.

(c) If this Court's reluctance to see any further proceedings take place in this case (Op. 18-19) compels it not to grant a further hearing on any of the matters raised herein, then we respectfully urge that the Court consider exercising its power of remittitur to reduce the award below in

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[18] The proof of service, which is part of the record before the Court but not printed in the Appendix, is reproduced as an attachment to the affidavit of Victor P. Kayser, filed herewith. See also AA. 234 where, during the reopening argument, it was pointed out to the trial judge that the pre-trial brief was filed only six days before trial.

light of the release defense or at least to reflect the compensation received by Zenith in the RCA settlement. 6A Moore, Federal Practice ¶ 59.05 [3], pp. 3737-52, at 3738 (2d ed) ("The use of remittitur . . . furthers the legitimate objective of bringing litigation to as speedy and expeditous end as is reasonable").

Applying the release, damages from post-release conduct might be approximated by comparing Zenith's post-release market share with its initial U.S. television market share (A. 3563-65). Applying only the settlement compensation, its effect could be approximated by allocating the consideration in declining amounts over the years, reflecting decreasing injury from pre-release conduct (Op. 19-20 and n. 9).

We respectfully submit that this Petition for Rehearing should be granted.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that this petition is presented in good faith and not for delay.

Victor P. Kayser

Dated: March 19, 1971

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970.

No. 80

ZENITH RADIO CORPORATION, A CORPORATION,
Petitioner,

vs.

HAZELTINE RESEARCH, INC., A CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

COUNTY OF COOK }
STATE OF ILLINOIS } ss

AFFIDAVIT OF VICTOR P. KAYSER

Victor P. Kayser, being first sworn on oath deposes and says:

(1) He is an attorney for Hazeltine Research, Inc. (HRI), respondent in the above entitled case, and was actively involved in the proceedings in the trial court after entry of the initial findings and in the various appellate proceedings in this case.

(2) The case of *Zenith* v. *United States,* No. 67 C 1675, Northern District of Illinois, first came to the attention of HRI's counsel in December 1970 as a result of a news story

concerning the decision in that case by the District Court on December 8, 1970. The quotations in the foregoing Petition for Rehearing from depositions in *Zenith* v. *United States* are true and correct quotations taken from certified copies of the indicated depositions on file with the Clerk of the aforesaid United States District Court for the Northern District of Illinois.

(3) Attached hereto is a true and correct copy of the proof of service of Zenith's pretrial brief showing service of this brief upon HRI's counsel on Tuesday, February 11, 1964.

/s/ VICTOR P. KAYSER

.....

Victor P. Kayser

SUBSCRIBED and SWORN to before
me this 17th day of March, 1971.

/s/ RUTH REINSTEIN

.....

Notary Public

My commission expires
11 day of January, 1975.

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

HAZELTINE RESEARCH, INC., Plaintiff, v. ZENITH RADIO CORPORATION, Defendant.	Civil Action No. 59 C 1847

Service and receipt of four (4) copies of ZENITH'S PRE-TRIAL BRIEF OF THE ANTI-TRUST ISSUES RAISED IN THE ANSWER AND COUNTERCLAIM is acknowledged this 11th day of February, 1964.

/s/ RICHARD D. MASON
Attorney for Hazeltine Research, Inc.